

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL LEWIS GARDNER,

Defendant-Appellant.

UNPUBLISHED

March 1, 2007

No. 266205

Ingham Circuit Court

LC No. 05-000459-FC

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by right from his conviction of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury was instructed that defendant could be convicted of either charge on an aiding and abetting theory, MCL 767.39. Defendant argues that the prosecutor failed to present sufficient evidence for a rational jury to find him guilty beyond a reasonable doubt. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Our Supreme Court recently clarified the application of MCL 767.39 to MCL 750.227b:

. . . Under the aiding and abetting statute, MCL 767.39, the correct test for aiding and abetting felony-firearm in Michigan is whether the defendant “procures, counsels, aids, or abets in [another carrying or having possession of a firearm during the commission or attempted commission of a felony].”

The prosecutors must do more than demonstrate that defendants aided the commission or attempted commission of the underlying crimes Rather, the prosecutors must demonstrate that defendants specifically aided the commission of felony-firearm. Establishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of

the crime. [*People v Moore*, 470 Mich 56, 70-71; 679 NW2d 41 (2004) (citations and footnote omitted).]

In *People v Harris*, the companion case to *Moore*, our Supreme Court concluded that there was sufficient evidence to support Harris's felony-firearm conviction on an aiding and abetting theory. *Id.* at 73. The Court characterized the supporting evidence as follows:

[Harris] first "cased" the store, thereby ensuring that Mays could succeed in entering it while carrying a gun. He then relied on May's [sic] possession of the firearm to facilitate his own robbery of the customer. Finally, Harris expressly encouraged Mays to use he firearm in his possession to shoot the clerk after the clerk refused to give the men any money. [*Id.*]

The Court's reference to relying on Mays's possession to facilitate Harris's robbery stems from the following facts: "While Mays pointed the gun at a clerk, Harris approached a customer from behind and proceeded to remove the customer's wallet and other items from his pocket." *Id.* at 60. As set forth in this Court's unpublished opinion, Harris "pushed into [the victim's] back and told him to 'stay cool, man, stay cool'" and then "rifled through his pockets and took his driver's license, library card, cash, and ATM card." *People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2001 (Docket No. 222468), slip op p 2. Our Supreme Court also noted that "[w]hen the attempt to rob the store proved unsuccessful, defendant drove away with his accomplice and the firearm." *Moore, supra* at 73.

Deferring to the jury's authority to determine the weight of evidence and assess the credibility of witnesses, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992), and viewing the evidence in a light most favorable to the prosecution, the evidence adduced at trial was sufficient to support defendant's felony-firearm conviction. Like Harris, defendant in the case at hand used his accomplice's possession of the rifle to attempt to rob the victim. Although defendant did not make a verbal command for the victim's wallet or physically take anything from him, it is reasonable to conclude that defendant used and relied on the threat posed by the rifle to facilitate the attempted robbery. Also like Harris, defendant left with his armed accomplice when the attempted robbery failed. Defendant also acted "like an observer" for the armed man, thereby encouraging his use of the weapon during the attempted robbery. Although the evidence showed that defendant did not talk during the course of the robbery, the victim testified that the two men communicated nonverbally, with defendant nodding his head just prior to the men fleeing the scene. Accordingly, defendant fails to establish that his felony-firearm conviction was not supported by sufficient evidence.

The elements of the underlying crime of assault with the intent to rob are: (1) that the actor was armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon; (2) that the actor committed an assault; and (3) that the assault was committed with the intent to rob and steal. MCL 750.89; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

Here, the prosecutor presented testimony that the principal actor was carrying a rifle, threatened to "pop" the victim, and demanded that the victim turn over his wallet. Thus, all the elements of the underlying crime were established. Additionally, the victim testified that defendant and the armed man together approached the victim as he left his business at the end of

the business day. Defendant stood close to the armed man during the assault, which lasted for approximately ten minutes and during which the armed man three times demanded that the victim turn over his wallet. The victim testified that defendant acted as an “observer,” which in context can be understood to mean that defendant acted as a lookout. Finally, defendant gave a nonverbal sign to the principal just before the two fled the scene. Viewed in the appropriate light, this evidence is sufficient to support the conclusion that defendant assisted the commission of the underlying crime, and that he did so with the requisite state of mind.

We affirm.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Kurtis T. Wilder